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NOTE: Pursuant to Fed. Cir. R. 47.6. this disposition Is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

[ENTERED: DECEMBER 13, 2004]

04-3164

SHELBY J. SCOTT,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

In CASE NO(S). AT1221010257-W-3

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (LOURIE, RADER, and SCHALL, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED DEC 13 2004

/s/
JAN HORBALY, CLERK

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

[ENTERED: JANUARY 14, 2004]

SHELBY J. SCOTT,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
AT-1221-01-0257-W-3

DATE: JAN 1 4 2004

Steve Heninaer, Esquire, and Jonna M. Denson, Esquire, Birmingham, Alabama, for the appellant.

Walter A. Baker, Esquire, Redstone Arsenal, Alabama, for the agency.

BEFORE

Neil A.G. McPhie, Acting Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, *http://www.mspb.gov/mspb_library.html.*

FOR THE BOARD:

/s/
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:
By certified mail to:
Steve Heninger, Esq.
Heninger, Burge, Vargo & Davis, L.L. P.
2146 Highland Avenue
Birmingham, AL 35205

Jonna M. Denson, Esq.
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By regular mail to:

Shelby J. Scott
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Walter A. Baker
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U.S. Army Aviation & Missile Cmd (Prov)
Attn: AMSAM-L-G-G
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Redstone Arsenal, AL 35898-5120

Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

Merit Systems Protection Board
Atlanta Regional Office
401 West Peachtree Street, N.W.
Suite 1050
Atlanta, GA 30308

By hand to:

Office of the Special Counsel
1730 M Street, N.W.
Suite 201
Washington, DC 20036-4505

JAN 14 2004
(Date)

/s/
Jacquelin Wilson
Legal Assistant

Washington, DC

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

[ENTERED: DECEMBER 11, 2002]

SHELBY J. SCOTT,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
AT-1221-01-0257-W-3

DATE: DEC 11 2002

Steve Heninger, Esquire, and Jonna M. Denson, Esquire, Birmingham, Alabama, for the appellant.

Walter A. Baker, Esquire, Redstone Arsenal, Alabama, for the agency.

BEFORE
Stuart A. Miller
Administrative Judge

INITIAL DECISION

INTRODUCTION

On December 29, 2000, the appellant timely filed an -individual-right-of-action (IRA) appeal alleging retaliation for whistleblowing regarding the agency's actions: (1) refusing to grant her a compassionate reassignment; (2) placing her into a non-permanent general position rather than the officially designated position after her reassignment; and, (3) not selecting her for promotion on 24 separate occasions.

The appellant first sought corrective action with the Office of Special Counsel (OSC) before coming to the Board. *See* 5 U.S.C. §§ 1214(a)(3) and 1221(a). Thus, the Board has jurisdiction over the appeal. The hearing the appellant requested was conducted in Huntsville, Alabama, on May 7 and 8, 2002.

For the reasons set forth below, the appellant's request for corrective action is DENIED.

BURDENS OF PROOF

In an IRA appeal, as here, for the Board to order corrective action, the appellant must prove by preponderant evidence that she made a disclosure described under 5 U.S.C. § 2302(b)(8) and that the disclosure was a contributing factor in the personnel actions being appealed. *See Clark v. Department of the Army*, 997 F.2d 1466, 1470 (Fed. Cir. 1993), *cert, denied*, 114 S.Ct. 920 (1994); 5 C.F.R. § 1209.7(a).

To prove that she made a disclosure protected under 5 U.S.C. § 2302(b)(8), the appellant, herein, must

prove that she disclosed information that she reasonably believed evidenced a violation of law, rule or regulation. *Id.* Whether or not an employee's belief that a disclosure evidences a violation of law, rule or regulation is determined based on an objective analysis of all the pertinent facts. As stated by the United States Court of Appeals for the Federal Circuit, the test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would conclude that there has been a violation of a law, rule or regulation. *See LaChance* v. *White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999).

If the appellant meets these burdens, no corrective action will be ordered if the agency shows by clear and convincing evidence that it would have taken the same action even in the absence of the protected disclosure. *See id.;* 5 C.F.R. § 1209.7(b).

ANALYSIS AND FINDINGS

Background and Disclosures

At the time of her filing this IRA appeal, the appellant was employed by the agency as a Logistics Management Specialist, GS-13, in the Land Combat Directorate, Redstone Arsenal, Alabama. However, at this time, this was not her first tour of duty at Redstone Arsenal. She began her employment with the agency in March 1985 when she was selected for the Army Material Command's (AMC) Quality & Reliability Assurance Intern Program. After successfully completing her classroom training, she was assigned to Redstone Arsenal in the Product Assurance Directorate

of Missile Command (MICOM).

In July 1987 the appellant's whistleblowing activity began and continued for almost 2 years. She complained to and through her chain of command as well as the Inspector General regarding numerous violations of regulations and laws as well as abuses of authority. The subject matters of these disclosures included: inappropriate cash awards; alteration of time cards; irregular attendance; excessive leave usage; improper promotions; and, improper hiring and training practices. On June 19, 1990, the appellant filed a complaint with the Office of Special Counsel (OSC) complaining that she was denied a reassignment and not selected for promotion to a GS-11 position in retaliation for her whistleblowing.

Though she was promoted while her complaint was pending before OSC, she nevertheless filed an IRA with the Board on these matters. In an initial decision dated November 19, 1991 (Initial Appeal File, Tab 1, subtab 4), the Administrative Judge found that the appellant's disclosures were protected under 2302(b)(8) and that she was retaliated against based on her whistleblowing when she was not promoted. The Administrative Judge ordered that she be promoted retroactively.

Later, the appellant accepted a position overseas. She found the separation from her disabled daughter hard to bear and eventually transferred to AMC Headquarters in Virginia. Still, wanting and needing to be in the southeast, she submitted a request for a compassionate reassignment on May 4, 1997.

Initial Appeal File, Tab 1, subtab 3. In that request she asked for a position with AMC in St. Louis, Missouri, that would be duty-stationed in Huntsville, Alabama. Though that request was denied, a "job swap" was arranged for her by Lieutenant General Dennis L. Benchoff, Deputy Commander of AMC, wherein the appellant was assigned to a position in St. Louis that was to be permanently relocated to Redstone Arsenal in Huntsville. When she completed her training at Management Staff College, she reported to Redstone Arsenal.[1]

Over the next couple of years, the appellant complained loudly and often about improprieties in the personnel management system. Indeed, she even complained about these matters in public Town Hall meetings where the Command and many senior-level managers were present. Specifically, she complained that management was using non-competitive details and temporary promotions to reward its favorite employees and make these individuals better qualified for permanent promotions. Eventually, two investigative studies were conducted at Redstone Arsenal, under two different Commanding Generals, both of which found that the merit systems were being grossly violated at Redstone Arsenal as alleged by the appellant. Indeed, based on these investigations, corrective measures, such as new merit promotion procedures, were implemented.

As noted above, the appellant's first set of

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[1] The appellant testified that, even if her compassionate reassignment were approved, her reporting date would have been the same because of her training at he Management Staff College.

disclosures were found by the Board to be protected under the Whistleblower Protection Act (WPA). Thus, applying the doctrine of res judicata, I find that the appellant made these disclosures, had a reasonable belief in the disclosures and they were protected disclosures under the WPA. As for her second set of disclosures, the record reflects that these matters were investigated and found to have merit. Further, the parties stipulated that the appellant made the disclosures and had a reasonable belief in their accuracy. Thus, also I find that these disclosures were protected under the WPA.

The compassionate reassignment and job placement

As noted above, on May 4, 1997, the appellant requested in writing a compassionate reassignment to a position that would be duty-stationed at Redstone Arsenal in Huntsville, Alabama. She made this request because of her daughter. The appellant testified that her daughter was born disabled and required attentive care. When he daughter was 12 years old, she was kidnapped by two men and raped and sodomized. The men were caught and imprisoned. Once the men became eligible for parole, the appellant crusaded against their release. This required her to attend Parole Board hearings twice a year. Traveling to these hearings from Virginia

proved too much for her; so, she requested the compassionate reassignment on this basis.

General Benchoff testified that her request was denied. Interestingly, however, the record dos not contain any record of a written denial and no witness could state who at Redstone Arsenal denied the request. Nevertheless, Benchoff testified that he agreed with the decision to deny the request. He testified that, at that time, the Army, particularly AMC, was undergoing a reduction in force and the appellant's plight, though sympathetic, wasn't of sufficient high priority to warrant the compassionate reassignment. And, he noted so in a memorandum dated January 23, 2000. But, General Benchoff still wanted to assist the appellant because he respected her and her work very much.

As part of the reduction in force, many "jobs" were being relocated from AMC in St. Louis to Huntsville. And some were being moved to Virginia. General Benchoff was able to make a swap for the appellant after locating a position where the incumbent did not want to relocate to Huntsville but could relocate to Virginia. He put the appellant in this slot. The slot, according to both General Benchoff and the appellant was to be in the Javelin Program. And, this conclusion is supported by the Standard Form 50 which shows the appellant to be placed into site 27D, which she testified without rebuttal, is the symbol for the Javelin Program.

But, when she arrived for duty at Redstone Arsenal, the appellant's documentation reflected

assignment to a "00" position, an unspecified temporary designation for a position, and she was told to report to PEO Tactical Missiles instead of Javelin. The appellant testified that she was given very little to do in this position and she complained to General Benchoff about the situation. General Benchoff directed LTC Schwartz to investigate. And, based on that report of investigation, General Benchoff testified that, in his opinion, the appellant was being reprised against for her prior whistleblowing.

The evidence seemingly reveals that that the appellant's request for a compassionate reassignment was denied. Yet, no one knows who made the decision and there is no record of the request having been denied. Thus, it is impossible to examine the motive behind the denial, if, in fact, there ever was a denial. Moreover, the appellant's ardent supporter, General Benchoff, agreed that denying the request for the compassionate reassignment was proper given the priorities at the time. Thus, I must find that the appellant failed to prove, that whistleblower retaliation was a contributing factor in the decision to deny the compassionate reassignment.

Further, based on the totality of the evidence, I disagree with General Benchoff's conclusion that the placement of the appellant in the "00" slot with duty in PEO Tactical Missiles was retaliation for her whistleblowing. While I note that he directed her assignment via the swap into the Javelin Program and Redstone Arsenal did not comply, I must also note that he had the power and authority to make the change and did not do so. Redstone Arsenal's failure to abide

by General Benchoff's order does not directly equate to retaliation for whistleblowing.

Indeed, Tommie Cutts, Director of Medium Range Close Combat Directorate, formerly Supervisor in Land Combat Missile Directorate, testified that, when the appellant arrived, George Collier was already working on Javelin and was doing a fine job. It would be counterproductive to take Collier out of that position and put the appellant into that area where she might need considerable time to familiarize herself with the program and what was transpiring in the program. And LeRoy Daniels, Personnel Officer, testified that with the numerous transfers from St. Louis, Redstone Arsenal had many more employees at high grades than they needed in certain positions. Thus, as a business matter, some adjustments were necessary.

Further, Michael McGee, Chief Logistics Division for Aviation & Rockets Project Office, testified that he worked with the appellant in PEO Tactical Missiles and that she was doing a full GS-13 workload as was he at the time. He added that he had no knowledge of her being in the wrong slot and that Cutts told him she would do a good job there, and she did.

I find it inherently reasonable that management would be reluctant to take an individual out of an assignment and replace him when work was in progress and the incumbent was doing fine work. Plus, with the glut of high-graded employees, the efficiency of mission accomplishment demanded that some

adjustments be made. If, indeed, General Benchoff felt that placing the appellant in the "00" slot was retaliation for her whistleblowing activity, he could have and would have rectified the situation. But, he did not. And, I believe he did not do so because he knew there were legitimate reasons for Redstone Arsenal's actions. Moreover, I note that there is no evidence that the position in Tactical Missiles was any less a bona fide assignment or career-enhancing position than a position in the Javelin Program.

Based on the above, I find that the appellant failed to prove that her whistleblowing was a contributing factor in the agency's action placing her in a "00" slot in Tactical Missiles instead of in the Javelin program.[2]

The non-selections for promotion

The record leaves little doubt that the appellant is intelligent and performed her duties in an outstanding manner in every position she held during her career. Indeed, she was, at various times, described by her superiors as a an "out of the box thinker" and someone who got results at all levels of Command. Yet, she was not selected for 24 different positions. While this fact may raise suspicions, the evidence presented failed to prove that retaliation for

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[2] I note that the appellant testified that she was subsequently moved to Land Combat and then finally placed in a permanent slot as Supervisor/Chief Logistics Weapons System Directorate.

whistleblowing was a contributing factor in any of the non-selections.

As discussed above, the appellant made numerous protected disclosures concerning Redstone Arsenal's abuse of the merit promotion system. One of her specific complaints was that managers were identifying individuals they would like to see promoted and then using non-competitive details and temporary promotions to make these individuals better qualified for the permanent positions when they became available. The investigations and studies that were prompted by the appellant's complaints confirmed these abuses. Indeed, following the second report, the Commanding General at Redstone directed that the merit promotion plan and related rules be re-written to eliminate these abuses. And, the appellant was invited to be a participant in that process.

The evidence shows, however, that the appellant continued to be victimized by these abuses in the non-selections but not as retaliation for whistleblowing. It was undisputed that the abuses existed for many years. And, the turnover in high-graded positions, such as those applied for by the appellant, was minimal. Thus, many of the people who were non-competitively detailed and temporarily promoted were still in the applicant pool for the positions sought by the appellant. Thus, they were better qualified than the appellant by virtue of having garnered specific technical-area expertise or some other priority selection factor. Also, the record reflects that the appellant was an expert in general contracting and some the positions she sought that involved contracting required

experience in a specific type of contracting.

Moreover, the appellant presented no evidence for any of the non-selections that she was equally or better qualified for the position than the selectee. And, she presented no evidence regarding positions that used ranking panels that the members of those panels were aware of her whistleblowing or influenced by someone who may have a motive to retaliate against her.[3]

For seven of the positions applied for by the appellant, she was not referred for consideration by the selecting official.[4] In other words, following a

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[3] Indeed, with the exception of one member of one panel, the appellant did not even identify the members of the ranking panels. The evidence did reveal that several of the ranking panels came from within the personnel office. And, it was LeRoy Daniels, Personnel Officer, that was most embarrassed and affected by the appellant's disclosures and the subsequent investigations. Daniels' denials of knowledge of the appellant's involvement in these matters was simply not credible and he had motive to retaliate. Yet, no evidence was introduced to show that Daniels influenced or attempted to influence any of the ranking panels.

[4] See Agency Exhibit 6 for a matrix of all of the positions applied for by the appellant. The seven positions in this category are, by vacancy announcement number: 99 BK BK 023849; 99 BK BK 060966; 00 BK BK 024000; 00 BK BK 023410; 00 BK BK 051581; 99 BKBK 055081; and, 00 BK BK 021362.

review of the applicants for these positions, the appellant was either rated not qualified or failed to score high enough against the rating criteria to warrant referral. In these non-selection actions, the referral lists were either prepared by Department of the Army, the Centralized Civilian Personnel Office or the local civilian personnel office. And, there was no evidence that anyone involved in these rankings and referrals were aware of the appellant's whistleblowing or influenced by anyone with a motive to retaliate. The selecting officials, in each case, were unaware of the appellant's candidacy and could not have selected her for the position.

Another thirteen of the positions applied for by the appellant resulted in her being referred. But a ranking panel of subject matter experts gave her such a low score that she fell very low on the list of candidates and did not warrant an interview.[5] For example, in the two non-selection by Tommie Cutts, the appellant ranked in the lower third of the referred

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[5] These positions, by vacancy announcement are: 99 BK BK 006453; 00 BK BK 045707; 99 BK BK 052802; 99 BK BK 061245; 00 BK BK 000167; 00 BK BK 024012; 00 BK BK 024013; 00 BK BK 045678; 00 BK BK 041321; 00 BK BK 020955; 00 BK BK 009659; 99 BK BK 060978; and, 00 BK BK 007479.

candidates while the selectee ranked in the top 10[6]. In the selection by John Johns, the appellant ranked in the lower half of those referred and in the two selections by William McDonald, the appellant ranked approximately 23rd out of 32 candidates. For the selections made by Kathleen Wachs, the appellant ranked 27th out of the 31 candidates that were referred. And, Artro Whitman explained that the appellant ranked 18 out of 30 candidates and his selectee, David Thackery, was previously detailed into the position in question.

Further, selecting officials Gifford Lee, William McDonald, Kathleen Wachs, Artro Whitman and John Johns testified without contradiction that they were unaware of the appellant's whistleblowing activity. And, there was no evidence that any member of any rating panel had a motive to retaliate against the appellant or were influenced by anyone with such a motive.

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[6] Of all the selecting officials, it is Tommie Cutts who may have the most reason to retaliate against the appellant. Cutts was a friend and fraternity brother of Daniels and Cutts is the only supervisor who ever described the appellant's performance of duties as adequate, that she did not show initiative. Moreover, Cutts' denials of "killing" a QSI nomination for the appellant submitted by Samuel Collier were not credible, particularly in light of Collier's specific recollection that he passed the paperwork for the QSI on to Cutts. Nevertheless, for the three selections made by Cutts, the appellant was either not on the referral list or ranked very low by a rating panel. And, as noted above, there was no evidence that Cutts influenced the rating panels.

Regarding the selection made by William Lake (announcement number 99 BK BK 048076), Lake testified without contradiction that only the name of Nelson Martin was referred to him for consideration. Lake explained that Martin was entitled to priority consideration as a "PPP" and he had to select Martin or justify his "business-related" reason for not doing so in writing. He selected Martin. Clearly, in such an instance, there was no evidence of retaliation for whistleblowing in not selecting the appellant.[7]

Lastly, Paul Bogosian selected Natalie Van Dam for the position of Information Management Specialist in the Office of PEO Aviation, a position for which the appellant was a viable candidate but not interviewed. Bogosian testified that Van Dam previously held a position that he considered a precursor to this position. Van Dam had years of experience and education managing information systems in a complex area that the appellant did not have. Mindful that this position was in the PEO Aviation Office, Bogosian felt that the technical experience that Van Dam possessed weighed heavily in her favor. I found Bogosian credible and his testimony went unimpeached. Further, Bogosian testified that he was unaware of the appellant's whistleblowing until told to him in preparation for the hearing. Thus, I find that no evidence was introduced to show that whistleblower retaliation played any part

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[7] No evidence at all was introduced regarding selections made by Clifton Broderick (99 BK BK 062344) or Gifford Lee (00 BK BK 005198) when Lee selected John Yurko. Thus, I must find that the appellant failed to prove that whistleblowing retaliation was a contributing factor in these two non-selections and these are not discussed further herein.

in this non-selection.

Based on the above, and in consideration of the record as a whole, I find no evidence that whistleblower retaliation was a contributing factor in any of the 24 non-selection actions.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD:

/s/
Stuart A. Miller
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on JAN 15 2003, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be <u>received</u> by the court no later than 60

calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

United States Court of Appeals for the Federal Circuit

[ENTERED: FEBRUARY 8, 2005]

ORDER

Before LOURIE, Circuit Judge, RADER, Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on February 15, 2005.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: February 8, 2005

Cc: Shelby J. Scott
Lauren S. Moore

SCOTT V ARMY, 04-3164
(MSPB - AT1221010257-W-3)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record

UNITED STATES COURT OF APPEALS
For The Federal Circuit

SHELBY J. SCOTT, 04-3164
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

PETITION FOR REHEARING OF THE MERIT SYSTEM PROTECTION BOARD IN AT1221010257-W-3

* Based upon the fact that all of the Reprisals Actions against me were not addressed at the Hearing on Dec 10, 04; and the fact the Justice Department Lawyer (Ms. Moore) gave inaccurate/misleading information in her Oral Argument, and responses to the Judges questions; I request that another Hearing be held to address these issues in my Case.

All of the Reprisals Actions against me should have been addressed; MSPB Judge Miller erred in not addressing these issues. Judge Miller was notified of all of the continued abuse, harassment, and Prohibited Personnel Practices I was being put through. JUDGE MILLER NEVER ACKNOWLEDGED ANY OF THE INFORMATION/NOTICES SENT TO HIM.

On January 14, 2004 a Decision from Neil A.G. McPhie, and Susanne T. Marshall -Acting Chairman and

Member of the MSPB Board stating "no new, previously unavailable evidence and the administrative judge made no error in law and regulation that effects the outcome" (A 25) was a JOKE. It's evident that these people did not understand nor read the "Whistleblowers Protection Act 1989". (JA 71-84) (JA 401) (JA 38)

It's also evident that all the new evidence sent to Judge Miller must not have gotten to these people for review of my case. (Ref JA 238, 239,241, 242, 243,250-JA 437-Motion To Amend and Expand The Record)

Reference the JA's below of the evidence that was sent Judge Miller, and should have been considered, and he totally ignored this evidence. Judge Miller needs to be held accountable for not doing his job; he should be replaced.

* Passed over for promotion 200 times.

* Deplorable Working Conditions (JA 30-37)

* Hostile Working Conditions (I was told my Watson Chaney that the only way I would be promoted is when a Judge ordered AMCOM to do so.)

* Performance Appraisal Downgraded from Quality Step Increase (QSI) to a small Monetary - Union Grievance filed-the First Line Supervisor stated in the Grievance Hearing that he had put in for a QSI-Grievance still DENIED. (AJ 202 203-208)

(J. Thomas Lamphere filed an OSC Complaint stating that his Supervisor had given him a poor performance appraisal and that had affected him being promoted. He is now the Chief MSPB Judge at the Atlanta Office; when you compare the Reprisal/Prohibited Personnel Practices/Harassment in my OSC Complaints, and my Complaints were DENIED, and OSC gave J. Thomas Lamphere a favorable decision, IT'S UNREAL. There were/are other decisions made by OSC & MSPB that are HIGHLY QUESTIONAL.) (Ref. JA 53-54)

* Moved to different work Directorates seven times in one year.

* Put on AMCOM Surplus List.

* AMCOM Manager Gloria Brown suppressed evidence (Civil Service Award of the Year-Plaques/Letter of Congratulations) (JA 246, 247, 248, 250, 243, 241, 239, 238)

Reference the JA's below of other documents sent to OSC & MSPB and totally ignored. (These are just a few of the JA Documents sent to OSC & MSPB) JA 246,248,250,251),JA 30,37,38,130-138 JA 238-248 JA 225, 227, 437

JA 441-442

JA 243 - JA 322

If someone would take the time and read/review my BRIEF, and REFERENCE THE JOINT APPENDIXES (with the back-up documents/proof) of what has

happened to me I don't see how anyone could not see these are reprisals actions. I cannot understand why the Justice System would let a "Whistleblower" fall through the cracks, and that's exactly what's happen to me. I'm a "Whistleblower" I fall under the "Whistleblowers Protection Act 1989" and I'm suppose to be protected.

If you read the WBPA (Ref. AJ 71-84) all of the actions against me are named as reprisals actions. The Court System should know these AMCOM Managers will never admit to anything.

Judge Miller stated in his Decision that my allegations fall under the Whistleblowers Protection Act, then DENIED my Complaint, that's no logic to his Decision. For the Court to say that there is no connection in these reprisals actions against me, and me blowing the whistle, is unbelievable. If these are not reprisals due to me being a "whistleblower" why did this happen to me; why was I singled out; and no other Redstone employees have had to endure this type of abuse?

The Court Judge's statement that Gen. Benchoff's investigation concluded retaliation against me, (JA 188 Par 5.) and the Adm. Judge found Lt. Gen Benchoff very credible, and yet the Board suddenly finds Mr. Cutts & Mr. Daniels explanations to be sufficient, even though their credibility is questioned; Sir, I question whether Judge Miller was/is in bed with the "good old boys." Taking the word of UN-CREDIBLE AMCOM Managers over a very reputable 3-STAR General is disturbing.

Sir, when you upheld the MSPB Decision, you did the same thing; you took the word of un-credible AMCOM managers over a very reputable 3-STAR General; Sir that's very disturbing to me.

The witnesses that were called to testify at my MSPB Hearing May 7-9-02, lied on the stand. With the exception of two of the witnesses (Paul Bogian & Kathleen Wacks) all of the witnesses were at Redstone Arsenal when I prevailed in my MSPB Hearing - Sep 91. I was a GS-09, and represented myself, I was the one that questioned these people on the stand; they were very reluctant to have to testify and have to answer questions from a GS-09.

Ernest Young was the Deputy Commander at Redstone Arsenal (he retired 2001 at the top of the SES Level. SES positions are suppose to be mobility positions; he had been at Redstone for 42 Yrs. Mr. Young had to testify at my MSPB Hearing Sep 91, he was very rude on the stand but he had to answer the questions I asked him.

Ernest Young had to testify at my MSPB Hearing May 7-9 02, when asked if he remembered my other MSPB Court Hearing, he stated "that he didn't remember it". This was a LIE, my Case was HEADLINES in the Huntsville Times and the Federal Times everyone at Redstone knew about my case. (Ref. JA 61-69)

ERNEST YOUNG and LEROY DANIELS were the ones that would not let me come back to Redstone on a Compassionate Reassignment. The Personnel Director

and the Deputy Commander are the people who make these types of decisions.

My Compassionate had already been approved by AMC and I was registered at Redstone in the system but they would not let me come back. (Ref. JA 536)

When the Court Judge used the reference "Good Ol Boy Network" that hit it right on the head and it still is. Army Major General Al Sullivan (former Redstone CG) made the same comment at a Town Hall Meeting on Friday, September 22, 00. (Ref. JA 235 Article in the USA Today - JA 236, 237)

The question was asked Ms. Moore about these Managers if they were still at Redstone; her response was that some of them were.

Below is the status of these AMCOM Managers:

* Ernest Young - Retired 2001 - Top of a SES Position- He was the Deputy Commander at Redstone for approx 20 yrs if not longer. He was suppose to be mobile but had been at Redstone 42 Yrs. (Good Old Boy Network)

* James Flinn III- Retired 2004 - Top of a SES Position - He was Deputy Commander after Mr. Young left. He had been at Redstone for years, he was here in 1991. (JA 210, 209)

* Leroy Daniels - Retired 2000 (I think) Top of a GM-15

- Leroy Daniels used to work at Ft. Rucker Army Base but they were ready to fire him, they had put him on leave without pay. He came to Redstone in the 80's as a GS-09 or GS-11; even with all of his scams on promotions, not following the OPM Regulations, and all the screw-ups, he retired as a GM-15 Step 10. (Ref JA 138, 196a, 196b, 190 - 233) Ref. JA 6 Exhibit (2) Video Tapes) These Tapes are when I questioned the CG Gibson on the promotion scam that Mr. Daniels was doing; the CG said "I'll let Mr. Daniels address that" the first thing that came out of Mr. Daniels's mouth was, "we did make a little mistake there".

* Gloria Brown- Retired Jan 31 03 (Had been at Redstone for at least 22 Yrs.)- Top of a GM-15 - Downgraded my Performance Appraisal twice, put me on the AMCOM Surplus List, suppressed evidence that would have been presented at my MSPB Hearing in May 02; left these prestigious awards in her office to be thrown out, but retired at the top of a GM-15. (Ref. JA 242, 243, 244, 245. 246, 247, 248) These awards automatically warrant promotions.

* John Chapman - Still at Redstone- a GM-15-Director of Integrated Materiel Management Command - When I prevailed in my MSPB Case in Nov 91 - Mr. Chapman interviewed me for a job to get out of the Directorate I was working in.

He hired me, and assigned me to the Readiness Directorate, I worked there until I transferred to Kwajalein Island.

* Tommie Cutts - Still at Redstone - a GM-15-Chief - WSD Downgraded my Performance Appraisal. (Ref. JA 202,203,204) I had to work in Deplorable Conditions (all other 13's and even a 12 had their own offices) I sat out where all donations were put for Army Relief. He gave my job that I was assigned to in the Javelin PM Office to his "Buddy" George Collier (Ref JA 228, 229). Mr. Collier was put in the position as a GS-13 but got promoted right after he got the job to a GM-14 and is now a GM-15. THIS DAMAGED MY CAREER, IF I HAD BEEN PUT IN THE JOB I WAS SUPPOSE TO BE PUT IN, I WOULD BE A GM-15 BY NOW.

Several years ago, one of the above mentioned managers was having an affair with one of his employees (both married) the person's husband who worked at Redstone found out about it, and tried to commit suicide; there were lawsuits filed against this manager, this manager is still one of the top managers here at AMCOM and he career has not been touched. This is common knowledge in the IMMC Directorate.

If you report what these managers are doing, and what its costing taxpayers, your Career is RUINED; and they walk free. SOMETHING IS WORNG WITH THE SYSTEM.

<u>To say that AMCOM Managers are not credible people is an UNDERSTATEMENT.</u>

Judge Rima - MSPB Judge in Nov 91 Case- Stated that "testimony by Army managers last September "lacked credibility" or was "wholly discredited." (Ref JA 429)

Judge Miller (MSPB Judge in May 02 Case) wrote in his Decision that Tommie Cutts and Leroy Daniels were not credible people but upheld them in his Denial of my Case.

What is more disturbing is that with all the EVIDENCE presented to the US Federal Court of Appeals, and you Judges being the "Court of the Land"

Up-held the MSPB Decision.

With the Court Judge stating that my case was a "compelling case", the US Federal Court of Appeal should have taken action and reversed the MSPB Decision and ordered a FAVORABLE Decision in my case.

It's evident to me that someone didn't read, and understand my Brief, my Reply Brief of Petitioner, and my Joint Appendixes. My BRIEF, REPLY BRIEF & JOINT APPENDIXES had already addressed the issues and gave the correct answers to the questions y'all asked in the Court Hearing. If my Brief, Reply Brief & Joint Appendix had been read and reviewed before the Hearing and after the Hearing; you would have found that all the Oral Argument given by Justice Department Lawyer Ms. Moore was <u>incorrect and misleading</u>.

I'm asking for my case to be thoroughly reviewed again, and compare the Reprisals/Prohibited Personnel Actions/Abuse/Harassment that I've had to endure, to what's the "Whistleblowers Protection

Act of 1989" states are covered under this LAW. READ (JA71-84 WBPA 1989

I'm a "Whistleblower" I prevailed in a "Whistleblowers Case" against Redstone in Nov 1991; Redstone had/has the same Upper Level Managers here when I transferred back to Redstone in Aug 97; the same gross mismanagement practices, and gross abuse of the OPM Rags, and promotion practices were still going on so I blowed the whistle again in Feb 1999. I and wrote a letter to Department of the Army - Office of Assistant Secretary Manpower & Reserve Affairs, 111 Army Pentagon-Washington, DC-David L. Snyder Acting Deputy Assistant Secretary (Civilian Personnel Policy). HQDA & AMC did an investigation of my allegations and found my allegations were true. (Ref. JA 138) (Ref. JA196b—196uu)

Judge Miller stated that my allegations fell under the "Whistleblowers Protection Act" but Denied my Complaint, he erred in his Decision.

The Court Judge's statement that -"if an individual is employed in the system that has personnel administration defects and they're passed over for promotion; they may or may not have some kind of complaint. But, I, I don't see how that would be a whistle blowing complaint."

Sir, if the individual (me) employed in the system that has personnel administration defects and that individual (me) reports/blowes the whistle to the Headquarters Department of the Amy at the Pentagon (Ref. JA 138) about the scam on promotions and not

following the OPM Regulations; and HQDA ordered an investigation and the allegations are founded, (Ref JA 138, JA196a-196uu) and that individual (me) has had all the prohibited personnel practices taken against them; Sir, that is a whistle blowing complaint.

Judge Miller stated my allegations fell under the "WBPA 1989" but denied my complaint; there is no logic to his decision, he's saying one thing and doing another.

(Ref. JA 187-188) Gen Benchoff's letter states "that the investigation done by LTG Schwarz confirmed that Ms. Scott was not being treated appropriately. Based on what I was told by the IG, I believe her treatment after being reassigned to Redstone Arsenal was direct result of her complaint during her earlier assignment there and a definite act of reprisal against her by her chain of command."

MS. MOORE'S ORAL ARGUMENTS

* Ms. Moore's statement that Gen Benchoff did not personally investigate is correct, but misleading. 3-STAR Generals don't do the actual work, they order someone else to do the actual work, and report back to them. Gen Benchoff did personally order the IG Investigation, he sent LTC Schwarz to investigate and report back to him. (Ref. JA187-188)

* Ms. Moore's statement "and they found not that it was reprisal; they found it was inappropriate that she was placed in temporary positions upon her return to Redstone Arsenal." THIS STATEMENT IS

INCORRECT. (JA 187-188 Bottom of Par. 5) Gen Benchoff stated "based on what he was told by the IG - a definite act of reprisal against her by her chain of command."

* Ms. Moore's response to the question "does this time in that temporary, uh, position affects her career path at all??"

"It does not, Your Honor. Because in her qual... her personnel, or civilian qualifications record, which is in the appendix, it shows that she received the GS-13 permanent slot effective August 7th of 97. So, they made that retroactive to when she arrived at Redstone Arsenal." THIS IS INCORRECT

Being placed on a "00" Slot is a no-win situation, if the agency has a reduction-in-force, the people on "00" Slots go out the Gate first. People on "00" slots can be transferred anyplace, anytime, and it does affect your promotion possibilities. Civil Service employees get paid at what their pay is on the Pay-Scale regardless of the type of slot they are on. Ms. Moore stating I was placed on a GS-13 permanent

Slot effective August 7th 97 is INCORRECT. I reported to Redstone in Aug 1997, I was placed on a "00" slot and I didn't get a permanent slot until around the end of 1998. (Ref JA 228-229)

* Ms. Moore's statement "they gave her the GS-13 pay retroactive the Aughust7th when she arrived at Redstone Arsenal. IS INCORRECT.

I was already drawing GS-13 pay when I come to Redstone, I've been a GS-13 since 1994; what Ms. Moore failed to tell the Court pertaining to the "retroactive pay" was that when I transferred from AMC HQ to ATCOM-St Louis, and ATCOM was merging (it was closing-BRAC) with Redstone with all the people changing pay agencies, the pay-system had a failure, and I, and other that transferred to Redstone didn't get a paycheck for 2/3 months, and we were paid retroactive back to the time we reported to Redstone to catch up with our pay.

* Ms. Moore failed to tell the Court that the GS-13 Job in the Javelin Office that I was suppose to get, (Ref JA 190-191-TDA showing that was suppose to be my job) was a GS-14 position, right after George Collier (Tommie Cutts's Buddy) got the job, he was promoted to a GS-14 and is now a GM-15. This definitely damaged my Career. (Ref. JA 228, 229)

* Ms. Moore's statements - "So, she has not been damaged in anyway. Further, she, um, became a supervisor at one point." <u>This is a misleading statement;</u>

When I was finally put on a permanent slot the latter part of 1998 (I reported to AMCOM - Aug 97) I was put on a job in the Weapon Systems Directorate.

I was put in a Supervisor GS-14 slot but I wasn't promoted to a Supervisor, I NEVER RECEIVED GS-14 PAY for doing the GS-14 work. I questioned Tommie Cutts regarding this to no avail. (Ref. JA 229) Reference (JA-127) Letter written by COL. Atwood (to

Tommie Cutts) who was the Director of WSD that I reported to, and worked for stating that I should be promoted, but it did no good.

When I questioned Watson Chaney-Deputy to Tommie Cutts regarding promotion, he said, "Shelby, the only way you'll be promoted is when a Judge orders AMCOM to do it."

In my Compassionate Reassignment Request-May 97; I listed three jobs that I had checked out to find were vacant at Redstone, I didn't get any of those jobs because Redstone would not let me come back, I had to be put on a swap out with an employee at ATCOM. I had already been registered under US Army Materiel Command (AMC) Compassionate Reassignment Program - Jan 02, 96, and Registered in four different Career Series, and Redstone would not let me come back.

Ms. Moore was incorrect in saying I got one of the jobs I had listed as being vacant on my Reassignment Request. If the job I got allowed why haven't I been promoted?

* Ms. Moore's response to the question; "if Mr. Cutts and Mr. Daniels were still at Redstone"

"Your Honor, I believe one or both of them have retired, but regardless of whether they're still there, neither of them was on the referring or selection panels for the promotion Ms. Scott received. ALL OF THIS IS INCORRECT INFORMATION.

1. I'VE NEVER RECEIVED A PROMOTION.

2. THE REFERRAL LIST COMES FROM HQDA PERSONNEL DIRECTLY TO THE REDSTONE PERSONNEL OFFICE LEROY DANIELS (NOW RETIRED) DIRECTOR OF REDSTONE PERSONNEL.

3. LEROY DANIEL GETS REDSTONE MANAGERS LIKE TOMMIE CUTTS (STILL AT REDSTONE) TO COME IN ON A PANEL AND THEY RATE THE NAMES ON THE LIST. (And they pick who they want to)

REF. JA 208a 208b - E-mail from HQDA Personnel regarding DA Referral Listing.

* Ms. Moore stated that "the Board determined that she presented no evidence that she was equally or better qualified for any of the 24 promotions." This is incorrect,

1. Ref JA 333-397 - RESUME (Head & Shoulders over any others)

2. Ref JA 208a, 208b - The E-mail at the bottom I sent to HQDA asking "Under The Freedom of Information Act" to forward the names of the persons for these positions were sent to AMCOM-Redstone Arsenal, Huntsville, AL.

Highest to Lowest

The E-mail at the top (JA 208b) is response from HQDA -Ms. CJ Sayre-Chief Referral Svcs Section stating -

"You are among the best qualified promo table candidates referred pm DARLs: #17-99-0022-02; #17-99-0023-01 and #13-99-0021-02. Selecting officials may choose any candidate referred on a noncompetitive referral list. Candidates referred are referred in alphabetical order by candidate type (example, all promo tables referred are referred in alphabetical order)."

3. Ref JA 125, 126, 127, 128, 231, 232, 247, 248
JA-125-Letter of Recommendation-LT GEN Benchoff-

JA-126-Letter from HQDA Office of the Asst Secretary -Research Development & Acquisition - Army Pentagon-Washington, DC - Selection for the CDG Program (These were maybe 3 or 4 others at Redstone that received these Letters) The people who get these letters have the highest ratings in the HQDA Referral System.

JA-127-Letter of Recommendation

JA-128-Letter of Recommendation

JA-232-Letter from LG General Kern asking me to serve as a Project Manager

(PM). "We need our "best and brightest" individuals to accept the challenges of being a PM."

THE PEOPLE WHO GET THESE LETTERS HAVE THE HIGHEST RATINGS IN THE HQDA REFERRAL SYSTEM AND THEIR NAMES COME OUT ON THE LIST FOR SPECIAL JOB/SELECTION REQUESTS.

I WAS SELECTED DEPARTMENT OF THE ARMY "ACHIEVEMENT MEDAL FOR CIVIL SERVICE" (Ref. JA 440, 441, 442) - These High Award would have been presented at my MSPB Court Heating May 7-9 02, if I had known I had received this HONOR, but it was presented to the MSPB Court in Jul 03 (Ref. JA 437- Motion To Amend And Expand The Record" after I found them on my desk on Jul 21, 03; after Gloria Brown retired Jan 31, 03. MSPB JUDGE MILLER NEVER ACKNOWLEDGED THIS MOTION or any other Notices sent to him regarding this matter.

(Ref. JA 239, 238, 241, 242,243)

ALL OF THE ABOVE DOCUMENTS/INFORMATINO WAS PRESENTED TO THE COURT TO SHOW THE REPRISALS ACTIONS AGAINST ME AND TO SHOW THAT I WAS MUCH BETTER/HIGHER RATTINGS THAN THE PEOPLE AT AMCOM THAT WAS PROMOTED.

* Ms. Moore's statement "A non referral is when an applicant is not qualified or didn't score high enough even to be on a general referral list." "For 13 of the 24 positions, her ranking was low enough that she was not selected for an interview for the position." (Ref JA 208b)

Ms. Moore's argument on how Referrals are forwarded is totally incorrect.

I have never been called in for an interview at Redstone; I've been passed over 200 times or more. My

Credential (Ref. JA 333-397) are head & shoulders over the Redstone Managers and over the people that were/are being promoted to GS-14 & GS-15 positions; I have worked at the level of The Chief Of Staff Of The Army. With the exception of the employees that transferred from ATCOM-St. Louis, MO on the BRAC to Redstone; all of the Redstone Managers have sat in the same chair and gone from GS-02/03 Clerks to GS-14 & GM-15's.

Watson Chaney (Deputy to Tommie Cutts) said to me directly "Shelby, the only way you'll ever be promoted is when a Judge Orders them to promote you."

* Ms. Moore's statements "REGARDING THE AWARDS" (Ref. JA 247, 248) (Ref. JA 242, 243, 244, 245) These Awards was evidence that was suppressed by AMCOM Manager Gloria Brown, they came in April 2002, my MSPB Hearing was May 7-9-02, and they would have been presented to the Court. These Awards were left in Gloria Brown's office to be thrown out, I didn't get the Awards until July 21, 03; Judge Miller was notified right away about this. (Ref. JA 239, 241, 243, 250, 238, 437)

My Career has been ruined, my Retirement damaged, and my Health damaged.
General Benchoff testified that I'm an "outside the box thinker" and had it not been for the reprisals actions against me that I would have already been a 14 and probably a 15 by now.

I was a GS-13 when I came to AMCOM in Aug 97, and still a GS-13, and no place to go.

I'm under a Doctors care and on medication for Anxiety Attacks. The first attack happened when we were at the lawyers office to give the EEOC testimony, the Paramedics had to come and get me, and put me in the Huntsville Hospital for a day and night to bring me back to life. (Ref. JA 218-219)

A few months ago three of my co-workers had to get me out of the building, drive me home to get my medication in me to bring me around.

I've been under six years of stress just going through the Government System trying to get help; I've gone through EEOC, Office of Special Counsel (twice) and MSPB (twice). I DON'T KNOW WHAT IT TAKES TO GET JUSTICE.

When GOD lets me open my eyes in the morning, I'm thankful, and it's a good day; that keeps me going.

I'm asking the Court for JUSTICE, and to reverse their Decision. I'm asking that I be promoted to a GS-14-Step 10, retroactive back five years. I'm asking that I be reimbursed for the retirement that I lost in my Thrift Saving Plan. I'm asking that I be compensated for the pain and suffering, and the damage to my health. Reference The Attached Settlement Request

I'll close with this question; Judge Rader, Judge Lourie, and Judge Schall, if you had endured the abuse, harassment, and stress for six years that I've endured; your Careers and Health damaged, and the Judicial

System had let you fall through the cracks; how would you feel, and what would you do??

I want to thank the Court for you time, I appreciate it.

Again, thank you,

/s/

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